

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

John Alexander Cochrane,

Plaintiff,

Civ. No. 4-94-221

v.

Vaquero Investments, Inc.,
and Tudor Oaks Limited
Partnership,

ORDER

Defendants.

Plaintiff is a Minnesota attorney who filed for Chapter 11 bankruptcy in the Middle District of Florida on December 21, 1992; his case was subsequently transferred to the District of Minnesota.(1) He appeals three January 28, 1994 orders issued by United States Bankruptcy Judge Gregory F. Kishel. The first order sustained objections to plaintiff's claimed homestead exemption.(2) The second ruled that plaintiff had failed to claim the homestead exemption through a tenancy by the entirety, and the third sustained objections to other claimed exemptions.(3) The second and third orders required Cochrane to amend his schedule C filing of exemptions to clarify his claim of tenancy by the entirety and to submit a list of exemptions by February 18, 1994.(4)

This court reviews findings of fact under a clearly erroneous standard, Fed. R. Bankr. P. 8013, and reviews findings of law de novo. *Wegner v. Gruenwaldt*, 821 F.2d 1317, 1320 (8th Cir. 1987).

Plaintiff first asserts that the bankruptcy judge misinterpreted Florida law when he determined that plaintiff's property there did not qualify for a homestead exemption. Plaintiff asserts that under Florida law temporary absences from the homestead do not qualify a debtor from claiming an exemption. Plaintiff's argument regarding Florida law on temporary absences from an established domicile is misplaced. The bankruptcy court found that plaintiff had not established that the Florida property was his primary residence.(5) Because it made this finding it did not reach the issue of whether plaintiff's lengthy absences qualified him. The case law plaintiff cites on temporary absences is not relevant to the issue before this court.

Moreover, a thorough review of the record indicates that the bankruptcy judge's factual findings concerning plaintiff's domicile are not clearly erroneous. The bankruptcy court found that plaintiff and his wife purchased a condominium in Naples, Florida in 1988 with the intention of moving there permanently upon retirement.(6) The court also found that he lived primarily with his wife in Mendota Heights, Minnesota until that house was sold in 1993. In 1991 he conveyed his interest in the Minnesota home to her through a series of quit claim deeds, but he continued to contribute to payments on the mortgage.

The court also found that plaintiff filed a declaration of domicile in Florida in 1982 indicating that he had been a resident of that state since March 1 of that year. He obtained a Florida driver's license and gun permit, is registered to vote there, holds

a Naples library card, and owned a Florida real estate license, which he let lapse in 1991. Plaintiff listed the Mendota Heights residence as his home address on his 1990 and 1991 federal income tax returns, however. He initially listed it on his 1992 return; an amended copy of that return, filed after plaintiff petitioned for bankruptcy, listed the Florida condominium as his home address. The bankruptcy court noted that plaintiff spent at most a month in Florida during 1992, and concluded that time spent in Florida that year was largely intended to lay a groundwork for the bankruptcy filing.

The bankruptcy judge found that plaintiff had established that he and his wife had been planning for over a decade to take up residence in Florida at some indefinite point in the future after their retirements, but that they never completed this plan. He

concluded that plaintiff had not manifested an present intent to permanently occupy the condominium, but rather treated it as a vacation home.

After a careful review of the record, the court finds itself in basic agreement with the findings and conclusions of Bankruptcy Judge Kishel. His findings with respect to the Florida property are not clearly erroneous and should be affirmed.

Plaintiff next argues that the bankruptcy court erred by excluding from an evidentiary hearing on the exemptions a deed that allegedly establishes that the Florida property is owed by plaintiff and his wife in tenancy by the entirety.(7)

During the evidentiary hearing plaintiff's counsel sought to introduce a photocopy of deed, which had been telefaxed from Florida that day. Defendants objected, and Bankruptcy Judge Kishel ruled that the document should be excluded under Fed. R. Evid. 1005, which provides:

The contents of an official record, or of a document authorized to be recorded and filed and actually recorded and filed, . . . if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Rule 902 provides that a document may be certified as correct by the custodian or another person authorized to make a certification.

Bankruptcy Judge Kishel rules that plaintiff failed to comply with Rule 1005 because the document was not certified, and because plaintiff did not testify that he had compared it with the original. He also ruled that a certified copy could have been obtained through reasonable diligence.

Plaintiff asserts that the deed should have been allowed into evidence under Federal Rule of Evidence 803(15), which provides that a statement contained in a document purporting to establish an interest in property is not excludable hearsay. Rule 803(15) states only that such evidence is not excludable as hearsay, however. It does not eliminate the evidentiary requirements of foundation and authentication. Documentary evidence which is admissible hearsay under Rule 803 is nonetheless excludable if it is not properly authenticated pursuant to Rule 1005.

Plaintiff does not assert that the contested document was certified. He did not testify at the hearing that he had examined it against the original, and the record contains no indication that a certified copy was unavailable. The defendants' objections to the claimed homestead exemption were filed in July, 1993. The evidentiary hearing was originally scheduled for August, 1993, but was postponed until November. The record indicates that plaintiff had ample time in which to procure a certified copy of the deed. A review of the record indicates the bankruptcy judge's ruling was not erroneous.

Plaintiff's final objection is that Bankruptcy Judge Kishel abused his discretion by setting a February 18, 1993 deadline for filing the amended schedule C.

Section 105 of the bankruptcy code provides that:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions [of the bankruptcy code]. No provision of this title . . . shall be construed to preclude the court from taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

The bankruptcy judge specifically invoked this statute, known as the "All Writs Act," stating that the instant case "fully merits action" under that statute.

According to plaintiff, the bankruptcy court abused its discretion because he did not abuse the bankruptcy process. A thorough review of the record indicates that plaintiff originally listed only "Florida Constitution Art. X, Section 4" and "Florida Statute 222" as the basis for his claimed exemptions, and that he raised the issue of tenancy by the entirety late in the petition process. Plaintiff originally claimed personal property exemptions of \$2,480,000, although the Florida constitution limits such exemptions to \$1,000. He conceded at the evidentiary hearing that his interest as payee under a \$380,000 promissory note, which he claimed was an Individual Retirement Account, did not qualify for exclusion. Moreover, shortly after the hearing the bankruptcy court converted his petition to an involuntary Chapter 7 for cause, after finding that plaintiff had breached his fiduciary duty to the estate and engaged in unreasonable delay.

A thorough review of the record indicates that bankruptcy judge Kishel's conclusion that plaintiff had abused the bankruptcy process is not clearly erroneous, and his order setting a deadline for amending schedule C filings was not an abuse of discretion.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that the orders of January 28, 1994 are affirmed.

Date: 8/3/94

/s/Diana E. Murphy
Diana E. Murphy
Chief Judge

(1) On February 15, 1994 the bankruptcy court converted the case to an involuntary chapter 7 for cause, including breach of fiduciary duty and unreasonable delay.

(2) The order is entitled "Order Sustaining Objection to Debtor's Claim of Homestead Exemption."
to (3) Those orders are entitled "Order Sustaining Objections Debtor's Claim of Exemptions" and "Order re: Status of Debtor's Claim of Exemption, and Objections Thereto."
debtor (4) Plaintiff complied with this deadline.
(5) A home must be the actual primary residence of the in order qualify for the homestead exemption. Matthews v. Jeacle, 61 Fla. 686, 55 So. 865, 867 (Fla. 1911), Lanier v. Lanier, 95 Fla. 523, 166 So. 867 (Fla. 1928).
(6) They had previously owned two other condominiums in Naples. Each was purchased with the idea that it could be sold at a profit or could eventually be used as a retirement home.
(7) Plaintiff asserts that Florida law exempts from bankruptcy property that is held in tenancy by the entirety.